Appendix A

The contract of sale delivered on July 22, 1937 (R. 129a-130a, 199a, 64a), differed in its terms from the option agreement of January 12, 1937 (R. 150a, 43a), principally in the following respects:

Option (Exhibit 1)	Contract (Exhibit 19)
1. Shares of capital stock optioned (ppg. 1st).	1. Business assets contracted to be purchased by optionee-transferee (Ppg. 3d, 25th).
2. Shares held by 14 stockholders (1st and final sheets).	2. Assets owned by 5 stockholders (ppg. 2d).
3. $50,000 deposit (ppg. 5th) liquidated damages on default (ppg. 6th).	3. $50,000 deposit (ppg. 1st); No liquidated damage default clause.
4. No restriction regarding petitioners engaging in further business.	4. Covenants that petitioner will not engage in barrel business in New York or New Jersey (ppg. 32d).
5. Balance purchase price payable on closing date in full (ppg. 6th).	5. Purchase price payable half cash and half deferred to day more than 4 months after closing. 25 percent deferment for inventory. No interest on deferred payments (ppg. 6th, 26th).
6. No metes and bounds description; No covenants re title to real property; No reference to violations; No reference to assessments.	6. Metes and bounds description. Express covenants re: Insurable marketable title in fee simple (ppgs. 3d, 9thB, 14th, 16th, 19th, 9thA, 20th); Freedom from violations (ppg. 11th); Freedom from assessments (ppg. 12th).

7. No fire risk assumption; No fire loss cancellation.	7. Fire risk assumed by seller; fire loss cancellation provision (ppg. 18th).
8. No restrictions on operations between option exercise date and closing date.	8. Express restrictions on operations between contract date and closing date (ppgs. 24th, 29th, 30th).

Appendix B

Statutes and Regulations

Revenue Act of 1936:

> "§115(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117(a), 100 percentum of the gain so recognized shall be taken into account in computing net income, except in the case of amounts distributed in complete liquidation of a corporation. For the purpose of the preceding sentence, 'complete liquidation' includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all of its stock in accordance with a bona fide plan of liquidation and under which the transfer of the property under the liquidation is to be completed within a time specified in the plan, not exceeding two years from the close of the taxable year during which is made the first of the series of distributions under the plan."

Regulations 94, Article 22(a)-21:

> "No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition."

No. 614

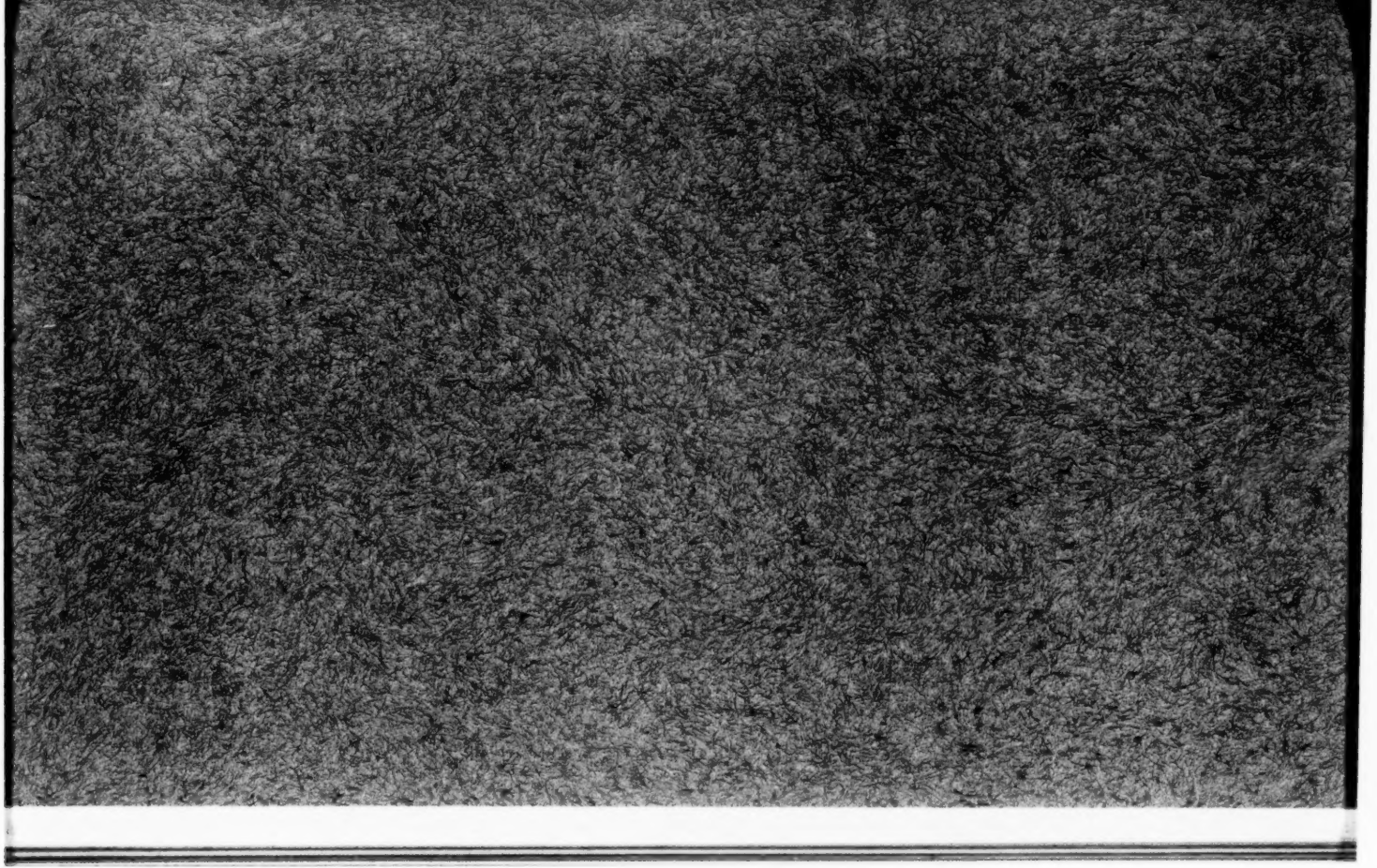
In the Supreme Court of the United States

October Term, 1938

Memphis Steam Laundry Co., Inc., Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.



INDEX

CITATIONS

617092—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 614

MEURER STEEL BARREL COMPANY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court of the United States (R. 238a–262a) is unreported. The opinion of the circuit court of appeals (R. 265–271) is reported in 144 F. 2d 282.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 21, 1944 (R. 271). The petition for a writ of certiorari was filed on October 20, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in affirming the decision of the Tax Court which held that a sale of the petitioner's assets, which was formally made by five of petitioner's stockholders acting on behalf of all of the stockholders, was, in substance, a sale by the petitioner and that the gain therefrom was taxable to it.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains on profits and income derived from any source whatever. * * *
>
> * * * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

> ART. 22(a)-19. Sale of capital assets by corporation.—If property is acquired and later sold for an amount in excess of the

cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111–113. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

ART. 22 (a)–21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. * * * Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. * * *

STATEMENT

The facts as found by the Tax Court, in so far as pertinent to the issue presented here, may be summarized as follows:

The petitioner, a New York corporation, had its principal place of business in Newark, New

Jersey (R. 238a). On and prior to July 15, 1937, its shares were held principally by members of the Meurer and Young families (R. 238a–239a). At the end of August, 1936, Jones, one of the shareholders, told Emanuel A. Stern, general counsel for petitioner and manager of the business affairs of Margaret C. Meurer and Mae F. Meurer, two of petitioner's shareholders, that he believed he could sell all of petitioner's shares to a competitor, and would like to have an option on them. Stern conferred with the other shareholders. Negotiations thereafter continued between Stern and Jones and were consummated on January 12, 1937, with the execution of an option agreement by the shareholders, as vendors, reciting that Jones, optionee, was "desirous of obtaining an option to acquire (directly or indirectly as * * * set forth), all the assets and goodwill of (petitioner), subject to all its liabilities, excepting the certain assets and liabilities * * * described as 'exclusions' ". (R. 239a–240a.)

Under the agreement, Jones acquired the right to purchase the shares on or before ninety days from date, but items of exclusion, consisting partly of marketable securities owned by petitioner, were reserved to petitioner or the shareholders, depending upon the method of sale adopted (R. 151a). The base price named was $70 a share of preferred and $30 a share of common, totalling

$500,000, subject to certain variations for change in net assets between June 30, 1936, and the closing date. Upon the exercise of the option, the vendors would transfer their shares or were to have the right to cause to be transferred to a new corporation all the assets and good will of the petitioner, excepting the excluded items, and to retain their shares in petitioner, in which event the base price was to be $500,000. In order to exercise the option, it was necessary for the optionee or his assignee to deliver to vendors' counsel notice of election to exercise the option together with a certified check of $50,000 and an undertaking to pay the purchase price to the vendors at the time and place fixed for closing. (R. 240a.)

On the same day, the shareholders agreed in writing to refrain from selling the shares during the life of the option, and appointed a sales committee with authority, *inter alia*, to extend the period of the option from time to time not exceeding six months, to execute sales agreements, and to vote the shares at shareholders' meetings so as to effectuate the intention of the parties and the election of the committee "as to the method of carrying out said sale of assets of said company that may be required to be divested and to enable distribution of distributable interests by liquidating dividend, reduction of capital or otherwise." On April 9, 1937, the sales committee extended the option from April 12, 1937, to July 12, 1937.

In his discussion with some of the shareholders, Stern informed them that he would never recommend a sale by the corporation because of the "possible extraordinary tax that would have to be paid." (R. 240a–241a.)

On July 9, 1937, a special shareholders' meeting was held at the home of the president who then stated that she believed it desirable for the petitioner to retire from its barrel business, that she had conferred with Stern, and that he was about ready to submit a plan. The report of the president was approved and she was authorized to request Stern to submit his plan at a meeting on July 15. On the same day, attorneys, representing Jones and an undisclosed prospective purchaser, told Stern that they wanted to work out a deal under the option, that they did not wish to carry out the purchase of the plant under a document such as the option and therefore requested a further extension of the option in order to negotiate the terms of a contract of sale. The sales committee extended the option to July 19, 1937. (R. 241a–242a.)

On July 15, 1937, Stern submitted his plan for complete liquidation and dissolution of petitioner, and it was approved by the shareholders. The plan included (1) a liquidating dividend in kind distributable July 17, 1937, subject to its liabilities; (2) collection and realization of accounts receivable and other remaining assets; (3) discharging

all obligations of petitioner and assuming payment of some obligations by shareholders, and (4) distribution during January, 1938, of a further liquidating dividend of the net assets on hand January 1, 1938, final distribution to be made on or before December 9, 1939. Resolutions were thereupon adopted to effectuate the plan. (R. 242a.) Consequently a first liquidating dividend was declared of all tangible property, as well as good will and other intangible assets, subject to all liabilities incurred on or prior to July 17, 1937, with certain exceptions not here material.

In order to consummate the sale expeditiously under the Jones option, some of the shareholders transferred their shares to three others and these three, together with two additional shareholders, made a partnership agreement on July 17, 1937, for the stated purpose of engaging, commencing July 19, 1937, in the manufacture of steel barrels at Newark, New Jersey, under the firm name of Meurer Steel Barrel Company. This agreement provided, *inter alia,* that such of the partners or other officers of the corporation as were not taken over by the ultimate purchaser of the business should be entitled to draw salary from the partnership at the rate formerly paid, until the close of the current calendar year. (R. 244a–245a.)

The petitioner transferred to the five partners, acting for all the shareholders (R. 15a–16a), all of the assets comprising its manufacturing busi-

ness, including good will and the right to use its name. The partnership assumed all of petitioner's liabilities incurred prior to July 17, 1937, with certain exceptions not here material. On the same day, Jones assigned his option to Rheem Manufacturing Company and the partners were informed of a "possible opportunity" to dispose of the assets received by petitioner's shareholders. (R. 245a.)

The sales committee extended the option to July 26, 1937. On July 17, 1937, certificates of outstanding shares were cancelled and redeemed to the extent of the "first liquidating dividend". On the same date, Stern wrote the Secretary of State of New Jersey that the petitioner had transferred its plant in New Jersey to its stockholders, as the first step in the process of dissolution, and contemplated presently withdrawing its right to do business in New Jersey. (R. 245a–246a.)

Subsequent to July 9 and until July 22, 1937, Stern and the attorneys for Jones and the purchaser negotiated a contract to amplify the terms of purchase set forth in the option. Stern informed the attorneys of the plan to liquidate the petitioner and to form a partnership to which would be transferred the manufacturing business. To the purchaser it was immaterial from whom the assets were purchased, as assets and not stock were what it wished to buy. Its attorney

demanded proof that the partners owned the assets, and this was furnished him. (R. 246a.)

The contract was signed by Rheem Manufacturing Company on July 17, 1937, and by the partners on July 22, 1937. In it, the purchaser gave notice of its election to exercise Jones' option. The down payment of $50,000 was made by check dated July 20, 1937, payable to the partners doing business as Meurer Steel Barrel Company. The transfer of the assets was to be made on August 2, 1937, and all adjustments computed as of the close of business on July 30, 1937. On August 6, 1937, the partners transferred all the assets comprising the manufacturing business to Rheem Manufacturing Company. That business was conducted by the partnership from July 17 to July 30, 1937, under the direction of Stern and two partners. (R. 246a.)

The Tax Court held that the gain from the sale of assets to the Rheem Manufacturing Company was taxable to the petitioner (R. 256a). Accordingly, it decided that there are deficiencies of $19,415.86 in income tax and $6,157.73 in excess profits tax for 1937 (R. 263a). The circuit court of appeals affirmed the decision of the Tax Court (R. 271).

ARGUMENT

In holding the petitioner taxable on the gain from the sale here, the Tax Court reached the

conclusion that each act in the negotiations was only a step in a "unified integrated plan" to sell the petitioner's assets, and that the partnership was merely a "technically elegant arrangement" to effect such plan and was not organized to retain the assets or to operate the business (R. 254a–255a). This decision, based on findings amply supported by the evidence, and affirmed by the circuit court of appeals, involved resolution of an issue peculiarly within the province of the Tax Court. *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231. Moreover, the decision, in so far as it is one of law, is in accord with established legal principles.

The evidence shows that negotiations for the sale were carried on from the beginning by Mr. Stern, petitioner's assistant secretary and general counsel throughout the whole period as well as attorney for some of the shareholders. When counsel was approached in 1936 relative to a sale, he indicated his unwillingness to have the corporation sell its assets because of the income tax which would be imposed on it. Thus, in January, 1937, an option to buy the petitioner's shares was given to a person desiring to acquire its assets "directly or indirectly" (R. 240a). But on July 9, 1937, representatives of the optionee and of the company, which later purchased the assets, advised counsel that the latter would buy nothing but assets. Accordingly, he began to

work with the purchaser's representatives on a contract to sell the assets and such work was carried on simultaneously with that on the plan for petitioner's liquidation which was first discussed at a shareholders' meeting on July 9 and was approved on July 15. The first liquidating dividend, covering the assets involved here, was entered on the books on July 17, and, on the same day, the purchaser signed the final contract of sale. A partnership, composed of five shareholders designated to act for all of the shareholders, was also formed on that day and received a deed covering these assets. The contract of sale gave notice of the purchaser's intention to exercise the option which had been assigned to it, and the down payment of $50,000 was made by the purchaser by check dated July 20. On July 22, the partners signed the contract to sell the assets and, under the agreement, continued in charge of the business only until the end of July. However, petitioner remained in existence until 1938 and the final distribution was not made until that year. (R. 239a–246a.) In view of these facts, the circuit court of appeals correctly held that there was ample basis for the Tax Court's findings and conclusion.

Furthermore, the decision of the court below, as well as that of the Tax Court, is in accord with the principle affirmed by this Court in a variety of contexts that tax consequences flow from the

substance of a transaction, not from the form in which it is cast. *Gregory* v. *Helvering,* 293 U. S. 465; *Minnesota Tea Co.* v. *Helvering,* 302 U. S. 609; *Griffiths* v. *Commissioner,* 308 U. S. 355. The decision is also in accord with many cases involving similar facts. See *Embry Realty Co.* v. *Glenn,* 116 F. 2d 682 (C. C. A. 6th); *Trafford Oil & Gas Co.* v. *Commissioner,* 78 F. 2d 814 (C. C. A. 3d), certiorari denied, 296 U. S. 630; and *S. A. MacQueen Co.* v. *Commissioner,* 67 F. 2d 857 (C. C. A. 3d). See also *Hellebush* v. *Commissioner,* 65 F. 2d 902 (C. C. A. 6th); *Tazewell Electric Light & Power Co.* v. *Strother,* 84 F. 2d 327 (C. C. A. 4th); *Northwest Utilities Securities Corp.* v. *Helvering,* 67 F. 2d 619 (C. C. A. 8th), certiorari denied, 291 U. S. 684; and *First Nat. Bank of Greeley, Colo.* v. *United States,* 86 F. 2d 938 (C. C. A. 10th).

Petitioner asserts that the decision here is in conflict with three decisions of the Second and Fifth Circuit Courts of Appeals, but two of these, as pointed out by the court below (R. 268), are clearly distinguishable. In *Chisholm* v. *Commissioner,* 79 F. 2d 14 (C. C. A. 2d), the partnership which took over the corporation's assets had been contemplated long before the sale was negotiated and continued in business after the sale was made by the partnership. Thus it was held there that the partnership was not organized as a temporary device to effect the sale but was a bona fide

firm. *Commissioner* v. *Falcon Co.,* 127 F. 2d 277 (C. C. A. 5th), is also distinguishable inasmuch as the Board of Tax Appeals found that the partial liquidating dividends of oil leases were made in that case after the corporation had refused to sell such leases and the sale was made by the shareholders, acting individually, after the distribution in partial liquidation.

The third case relied on by petitioner is *Court Holding Co.* v. *Commissioner,* 143 F. 2d 823 (C. C. A. 5th), now pending in this Court as No. 581 on the Government's petition for certiorari. Since we have asserted in that petition that that case and the instant one are in conflict, we do not oppose the issuance of a writ herein if the writ is to be granted in that case. It is worthy of note, however, that there is an issue in the *Court Holding Co.* case not present here. In the *Court Holding Co.* case, it is contended that the appellate court, despite the rule in the *Dobson* case, weighed the evidence and substituted its own views as to the facts for the findings of the Tax Court. Here, the decision of the Tax Court was affirmed by the court below.

CONCLUSION

While we do not oppose the issuance of the writ herein if the case of *Court Holding Co.* v. *Commissioner, supra,* is to be reviewed, we think that since no *Dobson* issue is presented, the granting

of the writ is not necessarily required under the circumstances.

Respectfully submitted.

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NOVEMBER, 1944.

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